So far, therefore, as concerns Mr. Perumal I would dismiss the appeal.

As regards the costs the Union is entitled to its costs of this appeal and in the Court below. As, however, they have shared representation with the unsuccessful appellant there may be a case for some apportionment. I would desire to express no opinion on that point at this stage in case counsel wish to be heard.

Hill J.A.: I have had the benefit of reading the judgment of the learned Chief Justice. I agree with all that he has said and have nothing to add.

Barakbah J.A.: I have had the benefit of reading the judgment of the learned Chief Justice. I agree with his reasoning and conclusion and have nothing to add.

The Union's and 2nd appellant's appeal allowed.

Appeal of 3rd appellant dismissed.

Solicitors: *Braddell & Ramani; H. I. Wrigglesworth & Co.*

LIEW WAH MING v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) November 19, 1962 and January 8, 1963]

[Ipoh — F.M. Criminal Appeal No. 35 of 1962]

Criminal Evidence — Child's evidence — Corroboration — Misdirection — Evidence Ordinance, 1950, s.157.

Criminal Evidence — Statement made to police by prosecution witness in the course of police investigation — Taking cognizance of — Courts Ordinance, 1948, s.30 — Criminal Procedure Code (Cap. 6), s.113(ii).

The appellant was charged with the murder of a girl under section 302 of the Penal Code and convicted and sentenced to death. At the trial one of the witnesses was a child of about 7 to 8 years and the trial judge had dealt with his evidence in summing up to the jury. On appeal, it was argued *inter alia* that (1) the trial judge failed to warn the jury adequately as to the dangers of accepting the uncorroborated evidence of a child of tender years, (2) he misdirected them on the meaning of corroboration; alternatively he failed to give adequate guidance thereon and (3) he directed them that evidence which in fact did not constitute corroboration could be tendered as corroboration.

Held: the direction was not satisfactory with regard to the question of corroboration. Although a former statement made by a witness is admissible to corroborate his testimony and with the object of showing consistency, the evidence of the child even if it was believed by the jury was not clearly corroboration of his story by independent testimony tending to connect the accused with the crime and this should have been pointed out to the jury.

On a preliminary point as to whether two statements made by a prosecution witness to the police in the course of police investigation under section 30 of the Courts Ordinance should be taken cognizance of,

Held: in the exercise of the Court's discretion it is not expedient in the interests of justice that these statements should be made use of.

Cases referred to:—

(1) *Chao Chong & Ors.* v. *Public Prosecutor* [1960] M.L.J. 240.

(2) *Mohamed Sugal Esa* v. *The King* A.I.R. 1946 P.C. 3, 6.

(3) *Rex* v. *Velayuthan* [1935] M.L.J. 277.

(4) *Mohamed Ali* v. *Public Prosecutor* [1962] M.L.J. 230.

(5) *Mutukumaraswami Pillai and 7 Others* v. *King-Emperor* I.L.R. 1912 Mad. 397.

(6) *Bechu* v. *The King* A.I.R. 1949 Cal. 613.

(7) *Rex* v. *Baskerville* [1916] 2 K.B. 658, 667.

COURT OF APPEAL (CRIMINAL).

David Marshall for the appellant.

Mohamed bin Ya'acob (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment on November 19, 1962, on preliminary point): We have been asked to "take cognizance", in the words of counsel, under section 30 of the Courts Ordinance of two statements made to the police in the course of the police investigation by a woman, Toh Siew Lan, who was a prosecution witness in this case.

Our law is not the law of England nor is it, so far as we are aware, the same as the law of British Guiana. Our law regarding such statements is contained in section 113 of the Criminal Procedure Code. It is no business of ours to question the wisdom of statutory provisions enacted by the Legislature. We are bound to assume that such provisions are enacted to ensure the doing of justice and that justice will best be done if the Courts are obedient to the directions of the Legislature and do not go beyond the bounds imposed by it.

As far as we are aware the only way in which this, or any other Court, can take cognizance of statements by witnesses made to Police Officers in the course of Police investigations is under the provisions of section 113(ii) which reads as follows:—

> "When any witness is called for the prosecution or for the defence, other than the accused, the Court shall on the request of the accused or the prosecutor refer to any statement made by such witness to a police officer in the course of a police investigation under this Chapter and may then, if the Court thinks it expedient in the interest of justice, direct the accused to be furnished with a copy thereof, and such statement may be used to impeach the credit of such witness in the manner provided by the Evidence Enactment."

That is the law in this country. It springs originally from what was section 162 of the Indian Criminal Procedure Code which is no longer the law of India. As long ago as 1923 the words "if the Court thinks it expedient in the interests of justice" were deleted thereby giving the accused person an absolute right at the trial to make use of such statements and now the law has been drastically remodelled by the Indian Criminal Procedure Act of 1955 which law gives an accused person a right to claim such statement before the trial.

Nevertheless, we must deal with the law as it is here. It is perfectly clear, and there are pre-1923 Indian authorities to this effect which will be found in the commentaries, that the words "if the Court thinks it is expedient in the interests of justice" give the Court absolute discretion.

At the trial the point was not raised and therefore there was no exercise of that discretion on the part of the trial Judge. It has been raised before us and we have thought that the only way in which we can deal with the matter is by ourselves applying our minds to the material to which the trial Judge would have applied his mind had he been asked to do so and to the best of our ability exercising our own discretion.

We have done so. We have perused with care, not once but again and again, the record of the evidence given at the trial by this witness and the two statements which she is said to have made to police officers, that is on 27th March and 8th May, 1962, and in our view and in the exercise of our discretion we hold that it is not expedient in the interests of justice that these statements should be made use of.

Hill J.A.: In the High Court at Muar in October 1962 the appellant was convicted and sentenced to death on the following charge:

"That you between 2.30 p.m. on the 23rd day of March, 1962 and 4.00 p.m. on the 24th day of March, 1962, at Segamat, in the State of Johore, committed murder by causing the death of GOH BEE YONG (f), and that you thereby committed an offence punishable under section 302 of the Penal Code."

At a sitting of this Court at Ipoh on the 20th November we quashed the conviction and sentence and ordered a re-trial and stated that we would later state our reasons.

Several grounds of appeal were argued by Mr. Marshall on behalf of the appellant, but we are now concerned only with ground (8) the relevant paragraphs of which are here set out —

(a) failed to warn them adequately as to the dangers of accepting the uncorroborated evidence of a child of tender years;

(b) misdirected them as to the meaning of corroboration; alternatively, failed to give adequate guidance thereon;

(c) directed them that evidence which in fact did not constitute corroboration could be regarded as corroboration;

The deceased girl was alive and seen by several witnesses at around 3 p.m. on 23rd March when she went out by the front door of her mother's hair-dressing saloon. At that time it is alleged that the appellant was in a room on the premises.

Dr. Sekar Chandran (P.W. 1) first examined the body of the dead girl between 8.30 and 9 p.m. on the 24th March and in his opinion the time of death was roughly about 24 hours prior to his examination. He considered this to be the minimum period. It is at once apparent that any evidence of the dead girl's movements and of those of the appellant during the afternoon hours of the 23rd March was of the greatest significance and importance.

Such evidence was given by Samuel Hong (P.W. 7), a boy aged seven who was warned to tell the truth. He stated that one afternoon about seven months before, while he was out playing, he saw the deceased being driven in a car by the appellant and he further said that he told his mother what he had seen when he saw her later the same day and that he told her this again the next day.

Alice Wong (P.W. 4), his mother had this to say

"My son told me: 'I saw Ah Koon and Ah Wah travelling in a motor car.' Ah Wah is the accused. I did not say anything. But my son kept on repeating it. I told him that he talked too much.

The following day I asked my son, Samuel if he saw Ah Wah and Ah Koon travelling in a car. He told me Ah Wah was driving the car."

In his charge to the jury the learned trial Judge had this to say with regard to the evidence of Samuel Hong.

"Now, gentlemen, this Samuel Hong is a young boy who cannot be more than 8 years old. He says he is a little more than 7 years. He was not put on oath because he does not understand its meaning. Counsel for the defence has readily pointed out that this boy is an intelligent boy but has suggested that he might have been prompted to say what he did by his mother. In considering the evidence of a child of this age you must warn yourselves that there is need for corroboration, the reason for that being that a child sometimes cannot make the distinction between reality and something which he imagines to exist. You will remember his mother, Alice Wong, who gave evidence saying that her son told her about seeing the accused and the girl together but that she did pay any particular attention at that time and it was only later that she enquired from him. Well, you may think that that was corroboration. There was corroboration in the sense that the boy did tell her and you will have to examine Alice Wong's evidence as to that, too."

This may have been adequate in putting the jury on their guard regarding accepting the evidence of a child, but we should have preferred if the warning had been closer to the words used by this Court in its judgment in the case of *Chao Chong & Others* v. *Public Prosecutor*[1] namely:—

"Another reason, however, which in this country possesses undiminished force is that it is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination. In our view something of the sort should have been put to the jury. At the very lowest they should have been invited to consider their own experience in connection with stories told by children. It was not sufficient merely to observe that there is a risk in acting on the uncorroborated evidence of a child. In any event we have grave doubts as to whether even so far as it goes that observation is strong enough. As was said by Lord Goddard in the case of *Mohamed Sugal Esa* v. *The King* [2]:—

'It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law'."

We felt that the direction was not satisfactory with regard to the question of corroboration. It

may be that the learned Judge had in mind section 157 of the Evidence Ordinance, which is set out here for ease of reference:

Section 157.

"In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

This section has been considered on at least two occasions by local Courts, namely in *Rex* v. *Velayuthan*[3] by the Court of Criminal Appeal, Singapore, and recently by Ong J. in *Mohamed Ali* v. *Public Prosecutor*[4] and the corresponding Indian section has been considered by the Courts of that country and judgments of assistance to us are to be found in *Mutukumaraswami Pillai and 7 Others* v. *King-Emperor*[5] and in *Bechu* v. *The King*[6].

Section 157 is clear and unambiguous and there can be no doubt that in the circumstances laid down in that section a former statement made by a witness is admissible to corroborate his testimony and with the object of showing consistency. But the weight or value of such a statement as corroboration must always be a question of fact and no hard-and-fast rule, capable of mechanical application, can be laid down. While, therefore, the former statement of an accomplice or, as in the present case, of a child is admissible to corroborate his testimony and to indicate consistency the weight to be attached to it must vary with the facts of each case.

And in our view the admissibility of such statements does not affect the long established rule of prudence with regard to the corroboration required of accomplices and young children. We cannot do better than repeat in this respect what Lord Reading said in *Rex* v. *Baskerville.*[7]

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only that the crime has been committed but also that the prisoner committed it. ..... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

The tale which Samuel Hong told his mother, even if this evidence was believed by the jury, was clearly not corroboration of his story by independent testimony tending to connect the accused with the crime and this should have been pointed out to the jury by the learned trial Judge.

For the above reasons we considered that the directions of the learned trial Judge regarding the nature of the corroboration required of Samuel Hong's evidence was inadequate and perhaps misleading. In these circumstances it was not possible for this Court to say that, with a proper direction, the jury must have come to the same conclusion, and we accordingly quashed the conviction and sentence and ordered a re-trial.

Re-trial ordered.

JUSOH v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) January 8, 1963]

[K.L. — F.M. Criminal Appeal No. 43 of 1962]

Criminal Procedure — Insanity — Murder — Direction to the jury — Killing without motive — Absence of rebutting medical evidence — Criminal Procedure Code (Cap. 6), s.348.

Penal Code, ss.302 and 84 — Murder — Defence of insanity — Direction to jury.

The appellant was charged and convicted of murder at Kuala Trengganu and sentenced to death. On appeal, it was argued: (1) the learned trial judge misdirected the jury as to the nature of the burden which lay on the defence in the case of insanity, (2) his direction as to the law on the subject was inadequate, and (3) he did not deal with the relevant evidence in such a way as to give the jury a proper comprehension of the defence case.

Held: (1) the trial judge's direction to the jury as to the onus of proof complied with the passage set out in *Chia Chan Bah* v. *The King* [3] and could not be said to be wrong;

(2) the combined effect of the somewhat cursory way in which the law was stated to the jury and the way in which the evidence was dealt with was that the defence was not adequately put to the jury;

(3) in view of the way in which the jury were directed, the appellant had been deprived of a chance of being acquitted which he would have had had the jury been adequately directed and accordingly the conviction should be quashed.

Order made under section 348 of Criminal Procedure Code for detention pending the orders of the Sultan of Trengganu.

Cases referred to:—

(1) *Azro* v. *Public Prosecutor* [1962] M.L.J. 321.

(2) *Looi Wooi Saik* v. *Public Prosecutor* [1962] M.L.J. 337, 339.

(3) *Chia Chan Bah* v. *The King* [1938] M.L.J. 147, 148.

(4) *Rivett* 34 Cr. App. R. 87.

COURT OF APPEAL (CRIMINAL).

G. T. S. Sidhu for the appellant.

Raja Abdul Aziz (Deputy Public Prosecutor) for the respondent.

Thomson C.J.: This appellant was tried at Kuala Trengganu for murder in contravention of section 302 of the Penal Code and on 30th October, 1962, he was convicted and sentenced to death. He appealed against his conviction.